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IN THE

Supreme Court of the United States

October Term, 1966.

No. 395.

RICHARD PERRY LOVING, et al.,
Appellants,

v.

COMMONWEALTH OF VIRGINIA.

On Appeal From the Supreme Court of Appeals for Virginia.

BRIEF OF AMICI CURIAE JAPANESE AMERICAN CITIZENS LEAGUE.

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ON APPEAL FROM THE SUPREME COURT OF APPEALS
FOR VIRGINIA

BRIEF OF AMICI CURIAE JAPANESE AMERICAN CITIZENS LEAGUE.

INTEREST OF AMICI CURIAE.

According to the 1960 United States census report compiled by the Bureau of the Census, Department of Commerce, there were 1,733 "Japanese" residing in the state of Virginia. The 1960 census report also lists 464,332 Japanese to be residing in the United States of whom 17,911 were residents of the seventeen States which presently maintain anti-miscegenation statutes.[1] And while of these

1. Alabama 500; Arkansas 237; Delaware 152; Florida 1,315; Georgia 885; Kentucky 664; Louisiana 519; Maryland 1,842; Mississippi 178; Missouri 1,473; North Carolina 1,265; Oklahoma 749; South Carolina 460; Tennessee 507; Texas 4,053; Virginia 1,733 and West Virginia 176.

seventeen States, only Georgia's anti-miscegenation statute expressly mentions "Japanese"[2] several other anti-miscegenation statutes employ terms such as "Malay race",[3] "Mongolian",[4] and in Oklahoma[5] and Texas[6] presumably Japanese would be classed as "white persons" although this is by no means clear. Further, as to the remainder of these seventeen States it is similarly unclear as to whether or not a person of Japanese ancestry is a member of the class severally designated as "white person", "Caucasian" or "colored person."

Because of these confusions which peculiarly plague persons of Japanese ancestry and those similarly situated and further as an American organization vitally interested in, and concerned with, the dignity and liberty of all Americans, the Japanese-American Citizens League ("J.A.C.L.") files this brief *amici curiae*. Briefly, the J.A.C.L. is a non-profit, charitable organization with a national membership in excess of 20,000 persons who reside throughout the United States and while its membership is largely comprised of persons of Japanese ancestry, its membership also includes, without limitations, Americans of varied faiths, creed and color.

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2. Georgia Code Annotated, Tit. 53, § 312. "*White person defined.* The term 'white person' shall include only persons of the white or Caucasian race, who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No person, any one of whose ancestors has been duly registered with the State Bureau of Vital Statistics as a colored person or person of color, shall be deemed to be a white person." (Other relevant sections of the Georgia Code are set forth in Appendix A, under "Relevant Portions of State Statutes".)

3. Anno. Code of Maryland, Art. 27, § 398.

4. Mississippi Code Anno., § 459; Vernon's Anno. Missouri Stat. § 451.020.

5. Oklahoma Constitution, Art. 23, § 11.

6. Vernon's Texas Penal Code, Art. 493.

SUMMARY OF ARGUMENT.

I.

Since *Pace v Alabama,* 106 US 583 (1882) the rights, privileges and immunities of the individual in many facets and spheres of his life have, under the Fourteenth Amendment, been safeguarded to him, free of the odious circumscription of laws based on race. Vital and all-important as these rights are to the individual and to the preservation of a democratic society of free men, such rights appear as palpable and material ones in contrast to the intimate, personal right of privacy in marriage: *Griswold v Connecticut,* 381 US 479. Freedom in marriage concerns one of the most basic and fundamental rights of the individual, rooted, indeed, in one of man's biological drives. The mutual exercise by two individuals of such a right,—a noble goal otherwise promoted and blessed by society,—should not be converted into a crime or otherwise stigmatized by law merely because of race.

It would constitute a shocking outrage if the anti-miscegenation laws of Virginia (and the other sixteen States) directed that its citizens must marry a person of a *different* race. That this same operative principle is geared to operate in the other direction by the anti-miscegenation statutes makes it no less demeaning to the citizen and an invidious invasion of a basic, fundamental right.

Rather, the freedom of choice,—the freedom of choice *not* to marry a person of another race as well as the freedom to marry another without regard to race,—should and must reside with the individual, not with the government.

Pace v Alabama, supra, is not authority for sustaining anti-miscegenation laws: First, the "limited view [of *Pace*] of the Equal Protection Clause has not withstood analysis in the subsequent decisions of this Court": *McLaughlin v Florida,* 379 US 184, 188. Secondly, it is respectfully but firmly submitted that the narrow view expressed in *Pace*

was inherently faulty and misleading. What *Pace* failed to consider was whether or not "the same punishment to both offenders, the white and the black" (106 US at 207), would have been meted out if there had been two males, one white and the other Negro, who had been guilty of *identical acts* of "adultery and fornication" with the *same female* (white or "black"); it is clear that the punishment would differ and differ solely because of race. The same inequities would apply with even more gross injustice in the enforcement of anti-miscegenation laws, for miscegenous couples would be punished for engaging in an act, i.e. marriage, which is not only otherwise legal but which also is actually otherwise encouraged and blessed by the state.

II.

Where the exercise of state police power "trenches upon the constitutionally protected freedom from invidious discrimination based on race" such "bears a heavy burden of justification. . . .": *McLaughlin v Florida*, 379 US 184, 196. Virginia's state policy in support of its anti-miscegenation laws has been expressed in terms of maintaining "purity of public morals", "the preservation of racial integrity" and to prevent a "mongrel breed of citizens" as well as "obliteration of racial pride." Even assuming *arguendo* such objectives to be valid state interests (and within this racist context we cannot accept such assumption), since all races *other than white* remain free to intermarry with one another and thereby destroy *their* racial "purity", "integrity" and "pride", the insidious sophism of Virginia's state policy, as well as those of the other sixteen states with anti-miscegenation laws, is readily exposed as a racist, "white supremacy" law which is repugnant "to a free people whose institutions are founded upon the doctrine of equality": *Hirabayashi v United States*, 320 US 81, 100.

III.

Anti-miscegenation statutes have grown out of fundamental misconceptions of fact and serve no public purpose. The use of racial classification as a basis upon which to regulate the actions of individuals must be immediately suspect because such classifications are necessarily arbitrary and incapable of precise application. The stated purpose of the anti-miscegenation laws is to preserve pure races which the legislators thought were separate and distinct entities, but this is clearly not so and there is no such thing as a pure race. The underlying purpose is to preserve racial superiority—of the white race only—but there is no proof that the white race is superior. Moreover, the entire concept of a "master race" is repugnant to our society. When the fictitious foundations of these laws have been dispelled, the only remaining purpose is to preserve differences, such as skin color, nose size or hair types, which are clearly not valid bases of legislation. Finally, the laws must fall because they contain standards of proof which are impossible of application and are unconstitutionally vague. Such statutes, the surviving vestige of an era of exploitation and ignorance, cannot be tolerated.

ARGUMENT.

I.

It Is Respectfully But Firmly Urged That *Pace v Alabama*, 106 US 583, Should Be Overruled Not Only Because the Reasoning in That Early Case Is Inconsistent With Subsequent Decisions of This Court But Also Because the Reasoning in That Case Was and Is Inherently Fallacious.

(A) The Reasoning of *Pace v Alabama* Is Inconsistent With the Subsequent Decisions of This Court and Such Reasoning Should No Longer Be Given Any Currency.

Since 1882, almost 85 years ago, when an Alabama criminal statute founded solely upon race was upheld in *Pace v Alabama*, 106 US 583, on the reasoning that it applied "the same punishment to both offenders, the white and the black", this Court has over the years repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality". *Hirabayashi v United States*, 320 US 81, 100. The torchlight of the Constitution has been wielded to expose and burn away these remaining shackles to individual liberty and to cast forth light extending "to the full range of conduct which the individual is free to pursue, and [which] cannot be restricted except for a proper governmental objective." *Bolling v Sharpe*, 347 US 497, 499-500. And so it was that various rights of citizens and residents of this land have been reaffirmed and upheld, including the right to follow an occupation without discriminatory harassment or restrictions on account of race;[7] to freely enter into contracts[8]

7. *Yick Wo v Hopkins*, 118 US 356; *Truax v Raich*, 239 US 33; *Takahashi v Fish and Game Commission*, 334 US 410; *Steele v Louisville & Nashville RR Co.*, 323 US 192; *Colorado Anti-Discrimination Commission v Continental Air Lines*, 372 US 714.

8. *Adkins v Children's Hospital*, 261 US 525; *Holden v Hardy*, 169 US 366; *Allgeyer v Louisiana*, 165 US 578.

and to own land;[9] to learn foreign languages[10] or to maintain business records in a foreign language;[11] to receive schooling without regard to race,[12] without procrastination by purported spectres of racial violence[13] and free of schemes to perpetuate racial segregation;[14] to freely engage in inter-racial sports[15] and to attend public events on a non-segregated basis[16] as well as to have equal access to public facilities without regard to race;[17] to register to vote[18] and cast ballots unhampered by racial gerrymandering schemes[19] using ballots free of racial designations of candidates;[20] to travel freely from State to State[21] on non-segregated transportation facilities;[22] to have freedom of

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9. *Oyama v California*, 332 US 633.

10. *Meyer v Nebraska*, 262 US 390.

11. *Yu Cong Eng v Trinidad*, 271 US 500.

12. *Brown v Board of Education*, 347 US 483.

13. *Cooper v Aaron*, 358 US 1.

14. *Goss v Board of Education*, 373 US 683.

15. *State Athletic Commission v Dorsey*, 359 US 533, affirming 168 F. Supp. 149 (E.D. La. 1958).

16. *Schiro v Bynum*, 375 US 395, affirming 219 F. Supp. 204 (E.D. La. 1963).

17. *New Orleans v Barthe*, 376 US 189 (public parks and playground), affirming 219 F. Supp. 788 (E.D. La. 1963); *Evans v Newton*, 382 US 296 (public park, title to which had been transferred to individual trustees); *Wright v Georgia*, 373 US 284 (public playground); *Burton v Wilmington Parking Authority*, 365 US 715 (restaurant in parking facilities leased from municipality); *Turner v Memphis*, 369 US 350; *Katzenbach v McClung*, 379 US 294 (public restaurant); *Johnson v Virginia*, 373 US 61 (seating in courtroom); *Atlanta Motel v United States*, 379 US 241 (public accommodations).

18. *Louisiana v United States*, 380 US 145; *South Carolina v Katzenbach*, 383 US 301.

19. *Gomillion v Lightfoot*, 364 US 399.

20. *Anderson v Martin*, 375 US 399.

21. *Edwards v California*, 314 US 160; *United States v Guest*, — US —, 16 L ed 2d 239.

22. *Taylor v Louisiana*, 370 US 154; *Bailey v Patterson*, 369 US 31; *Morgan v Virginia*, 328 US 373.

association unfettered by the taxing power;[23] and to have the security of "protection of equal laws"[24] so that criminal penalties are not imposed upon persons for certain acts merely because the actors happen to be of differing races.[25]

These are but some of the rights and protections safeguarded to the individual. "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelly v Kraemer*, 334 US 1, 22. Now the question before the Court is whether the vitally personal "right of the individual . . . to marry . . . to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men", *Meyer v Nebraska*, 262 US 390, 399-400[26] may be circumscribed by racial classifications or whether such classification constitutes "an invidious discrimination forbidden by the Equal Protection Clause". *McLaughlin v Florida*, 379 US 184, 192-193. It involves "one of the basic civil rights

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23. *Bates v Little Rock*, 361 US 516.

24. *Yick Wo v Hopkins*, 118 US 356; "The equal protection of the laws is 'a pledge of the protection of equal laws'". *Missouri ex rel Gaines v Canada*, 305 US 337, 350.

25. *McLaughlin v Florida*, 379 US 184.

26. *Meyer v Nebraska*, 262 US 390, 399-400: "While this court has not attempted to define with exactness the liberty thus guaranteed, the term ["No state . . . shall deprive any person of life, liberty, or property without due process of law"] has received much consideration, and some of the included things have been definitely stated. *Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual* to acquire useful knowledge, *to marry*, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally *to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.* [Cases cited] *The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest*, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." Emphasis added.

of man": "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v Oklahoma,* 316 US 535, 541.

So personal is the exercise of this basic right of two individuals mutually selecting one another as their respective life partners in marriage,[27] and so intertwined is that choice with the fundamental concept of "life, liberty and the pursuit of happiness", that even under the now-rejected "separate but equal" doctrine of *Plessy v Ferguson,* 163 US 537, such right could not be abrogated by an edict directing an individual to seek a different mate who is just as "equal". For example, if his mutual selection involved one of two identical twins, no power, no statute, no edict could, or should, direct him to shift his choice even to the other "equal" identical twin. This is the nature of the basic fundamental right presently before this Court.[28]

In *McLaughlin v Florida, supra,* even though the Florida statutory prohibition involved "concepts of sexual decency . . . dealing . . . with extramarital and premarital promiscuity", *supra* at 193, yet because such statute was formulated on racial classification and laid "an unequal hand on those who . . . committed intrinsically the same quality of offense", *supra* at 194, this Court struck down such statutory provision as "invidious official discrimination based on race." *Supra* at 196. On the other hand, in the instant case of the appellants before this Court, the state statute of Virginia seeks, not to deter sexual promis-

27. *Griswold v Connecticut,* 381 US 479, 491: "To hold that a right so basic and fundamental and so deep rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments . . . or elsewhere in the Constitution would violate the Ninth Amendment . . ."

28. Cf *Perez v Lippold,* 32 Cal. 2d 711, 714, 198 P. 2d 17, 18-19 (1948); "Marriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means."

cuity or such similar opprobrious activity but rather the noble and necessary goal common to all persons—"[m]arriage and procreation [which] are fundamental to the very existence and survival of the race." *Skinner v Oklahoma*, 316 US 535, 541. If racial classification may not be imposed in a purported effort to curb sexual promiscuity then clearly racial classifications ought not be imposed to curb a person's noble aspiration of marriage.

(B) The Exercise or Imposition of Governmental Laws or Power Based Upon Race Has No Proper Place in Controlling, or Seeking to Control, the Fundamental, Basic and Highly Personal Right of Marriage.

Racial classification as a standard has no proper place in governmental action invading and seeking to dictate and regulate one of the most basic and intimate areas of a citizen's life, rising, indeed, even above many fundamental liberties in that the exercise of such right by the individual also involves one of man's basic biological drives.

The anti-miscegenation laws of Virginia and of the other sixteen states attempt to use race as a standard for determining and controlling, under the threat of various criminal sanctions as well as civil consequences, whom an individual may or may not marry. The nature and extent of this infringement upon the individual's vital right to choose his, or her, life mate in marriage may be exposed by applying the operative racial principle in reverse: it would be a shocking outrage if the state marriage laws directed that all its citizens must marry a person of a *different* race. That this same operative racial principle is geared in the other direction by the anti-miscegenation statutes makes it no less a shocking outrage which is demeaning to the citizen.

Rather, the freedom of choice,—the freedom of choice *not* to marry a person of another race as well as the freedom

to marry another without regard to race,—should and must reside with the individual, not with the government.

(C) The Reasoning in *Pace* Was and Is Inherently Misleading and Thereby Faulty.

Appellee, the Commonwealth of Virginia, would seek to sustain its racial laws on the eroded foundation of *Pace v Alabama*, 106 US 583, a foundation which this Court has viewed as not having "withstood analysis in the subsequent decisions of this Court." *McLaughlin v Florida*, 379 US 184, 188. It is respectfully but firmly submitted that not only did *Pace* narrowly view the Equal Protection Clause but also that its reasoning was inherently misleading.

Pace narrowly viewed an act involving a Negro male and a white female and concluded that the equal protection requirements were satisfied because the Alabama criminal statute imposed "the same punishment to both offenders, the white and the black." *Supra* at 207. What *Pace* failed to consider, however, was whether or not the same punishment would have been meted out to a white male who also may have been engaged, or could have been engaged in the *same act* with the *same white female*. Thus if two males,—one white and the other Negro,—had each been guilty of "adultery and fornication" with the same white female (or with the same Negro female), the punishment for the very same offense would differ and differ only because of race. A similar disparity would apply to the female in each particular instance.

This very same inequitable principle is given operative effect under the anti-miscegenation laws but with even greater injustice. For example, if two "white persons" enter into the marital status, such is not only not a crime but is indeed blessed by the state; however, if this couple be divorced and thereafter the ex-husband (or the ex-wife) should again enter into the very same status, i.e. marriage, but this time with a person who happens to be non-white,

now this otherwise blessed matrimonial state is converted into a *crime*—and solely on account of race, nothing else.

The attenuated doctrine of *Pace*, including its progeny of anti-miscegenation laws, should no longer be allowed currency among "free people whose institutions are founded upon the doctrine of equality": *Hirabayashi v United States*, 320 US 81, 100. *Pace* should be expressly overruled and the anti-miscegenation laws, in particular that of Virginia's, should be struck down as an affront to the dignity of all citizenry of our society.

II.

Virginia's Anti-Miscegenation Laws, as Well as Such Laws in the Remaining Sixteen States With Anti-Miscegenation Statutes, Violate the Right to "Equal Protection of the Laws" Not Only as to Its Non-White Citizens But Also as to Its White Citizens.

Assuming that "races" can be defined,—and as discussed hereinbelow, any classification is arbitrary,—Virginia's anti-miscegenation statutes[29] further run afoul of the Equal Protection Clause. Its statute declares that it shall be "unlawful for any white person in this State to marry save a white person or a person with no other admixture of blood than white and American Indian"[30] and also declares that "All marriages between a white person and a

29. Virginia Code § 20-50 *et seq.*, set forth under "Relevant Portions of State Statutes."

30. Virginia Code § 20-54: "It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

colored person [31] shall be absolutely void without any decree of divorce or other legal process." [32]

When the state exercises its police power, and, as here, "trenches upon the constitutionally protected freedom from invidious official discrimination based on race", then, "[s]uch a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification . . . and will be upheld only if it is necesary . . . to the accomplishment of a permissible state policy." *McLaughlin v Florida*, 379 US 184, 196. Virginia's "state policy" for its anti-miscegenation statutes has been expressed in terms of maintaining "purity of public morals", [33] "the preservation of racial integrity," [34] and, more recently, to prevent "a mongrel breed of citizens" as well as "obliteration of racial pride." [35] Accepting *arguendo* at face value the "state policy" of Virginia as so expressed, it is readily apparent that the only "purity", the only "racial integrity", the only avoidance of alleged mongrelization of the race are for *whites only* and *none other*, for under Virginia's laws, *all other races* are free to intermarry and thereby "despoil" one another without similar statutory safeguards for preservation of *their* "racial integrity" and "purity" and "pride". An example of more *un*equal protection of the laws can hardly be summoned.

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31. The purported, and circuitous, definition of "colored persons" is set forth in a separate section of the Virginia Code, § 1-14, as follows: "Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian; except that the members of Indian tribes existing in this Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians."

32. Virginia Code § 20-57.

33. *Kinney v The Commonwealth*, 71 Va. 858, 869 (1878).

34. *Wood v Commonwealth*, 159 Va. 963, 965; 166 SE 477 (1932).

35. *Naim v Naim*, 197 Va. 80, 90; 87 SE 2d 749, 755 (1955).

However, we do not for a moment suggest that the answer is to extend this racist principle,—for divested of its sophistry it is readily exposed as such,—to other races and thereby further compound this antithesis to the establishment and maintenance of a democratic society of free men.

In addition to denying the equal protection of the laws *inter*-racially, Virginia's anti-miscegenation laws also operate to deny equal protection of the laws to its citizens *intra*-racially. This comes about because Virginia's prohibition against entering into miscegenous marriages applies to a "white person *in this State*"[36] and to its residents who "shall go *out of this State*, for the purpose of being married. . . ."[37] Thus, should a non-resident interracial married couple move into Virginia and there establish a domicile then that particular interracial couple would enjoy rights and privileges which are denied to their respective counterpart citizens who are indigenous to Virginia, namely the right to marry and cohabit as man and wife without regard to racial differences.[38]

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36. Virginia Code, § 20-54. Emphasis added.

37. Virginia Code § 20-58. Emphasis added.

38. Of the remaining sixteen states with anti-miscegenation laws, the following four states appear to recognize the civil validity of interracial marriages by out-of-state non-residents:

Delaware, *Anon. v Anon.*, 46 Del. 458, 85 A.2d 706 (1951).

Kentucky, Revised Statutes, § 402.040: "If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized."

Missouri, *Johnson v Johnson's Adm'r*, 30 Mo. 72 (1860); Op. Att'y Gen. No. 87, Hamilton 10-16-62.

North Carolina, *State v Ross*, 76 N.C. 242, 22 Am. Rep. 678 (1877).

The following eight states would refuse to recognize miscegenous marriages of couples who moved into these states regardless of the validity of such marriage where contracted:

Alabama, *Osoinach v Watkins*, 235 Ala. 564, 180 So. 577 (1938).

Arkansas would appear to deny recognition to out-of-state marriages of non-residents who move into Arkansas. Ark. Stat.

However, should Virginia's laws be construed and applied to bar non-resident interracial couples from coming into or residing in Virginia[39] such would violate the privileges and immunities clause of the Fourteenth Amendment.[40]

Anno., § 55-104: "All marriages of white persons with negroes and mulattoes are declared to be illegal and void." At the very least, such couples would be subject to the penalty of "concubinage" which is defined in § 41-807 as "The living together or cohabitation of persons of the Caucasian and of the negro race. . . ."

Florida, *Whittington v McCaskill,* 65 Fla. 162, 61 So. 236 (1913).

Georgia, *State v Tutty,* 41 Fed. 753 (Cir. Ct., S.D., Ga. 1890).

Louisiana, 1948—50 Op. Att'y Gen. 248.

Maryland, *Jackson v Jackson,* 82 Md. 17, 33 A. 317 (1895), *dictum.*

Mississippi, *Miller v Lucks,* 203 Miss. 824, 36 So. 2d 140 (1948).

Oklahoma, *Stevens v United States,* 146 F.2d 120 (CCA 10, 1944); *Baker v Carter,* 180 Okla. 71, 68 P.2d 85 (1937).

The remaining four states,—South Carolina, Tennessee, Texas and West Virginia,—remain unsettled as to the civil effect to be given to a miscegenous marriage validly entered into by non-residents in another state. However, in Tennessee and Texas such miscegenous couples would be subject to criminal penalties for illegal cohabitation. Tenn. Code Anno. § 36-402: "The intermarriage of white persons with negroes, mulattoes, or persons of mixed blood descended from a negro, to the third generation inclusive, or their living together as man and wife in this state is prohibited." Vernon's Texas Penal Code, Art. 492: "If any white person and negro shall knowingly intermarry with each other in this State, or having so intermarried in or out of the State shall continue to live together as man and wife within this State, they shall be confined in the penitentiary not less than two nor more than five years."

39. Va. Code § 20-57. "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." As indicated in footnote 38, *supra,* of the seventeen states only four would recognize an out-of-state interracial marriage of parties who move into their states. In the remaining twelve states such marriages would be invalid in eight states and highly questionable in the last four states.

40. "The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities

Aside from the question of vagueness arising from statutes, courts and juries seeking to do what anthropologists with their scientific expertise have difficulty doing, namely, attempt to formulate and classify races of mankind, there also exist insidious uncertainties as well as confusion in these anti-miscegenation laws. For further example, under Virginia's penal provision § 20-59 criminality applies only to intermarriages of a "white person" and a "colored person" and § 1-14 defines a "colored person" as any person "in whom there is ascertainable any Negro blood." Thus, if a "white person" and a Japanese married while such would be unlawful under § 20-54, under the penal provisions of § 20-59 only the "white person" would be subject to criminal sanctions and the Japanese, being neither a "white person" nor a "colored person" presumably would, on the face of things, incur no criminal penalties. But this is far from being clear by reason of the last sentence of § 20-54 which reads:

> "All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

Thus, by this catch-all provision, an unsuspecting Japanese, as well as any other person similarly situated, might suddenly find himself swept into the web of those particularized provisions which, by their very specificity, appear to exclude Japanese.

The anti-miscegenation laws of the other sixteen states are similarly fraught with inconsistencies and injustices

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clause of the Fourteenth Amendment against state interference. Mr. Justice Moody in *Twining v New Jersey*, 211 US 78, 97 . . . stated, 'Privileges and immunities of citizens of the United States . . . are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States.' And he went on to state that one of these rights of *national* citizenship was 'the right to pass freely from State to State.'" Justice Douglas (concurring opinion) *Edwards v California*, 314 US 160, 178.

and some of these are referred to under "comments" of the *amici curiae* in the Appendix of the "Relevant Portions of State Statutes".

III.*

Anti-Miscegenation Statutes Are Based on Fundamental Misconceptions of Fact Which Render Them Unconstitutionally Arbitrary and Vague and Which Bear No Relationship to Any Legitimate Legislative Purpose.

(A) Racial Classification Necessarily Requires Arbitrary Selection of Population Groups and Its Use for Purposes of Legislation Must Be Highly Suspect.

> "The scientific study of human races is at least two centuries old. There are nevertheless few natural phenomena, and probably no other aspect of human nature, the investigation of which has so often floundered in confusion and misunderstanding." [41]

Although anti-miscegenation laws were enacted during the height of the confusion and misunderstanding about the concept of race, even upon today's understanding, race is a tremendously difficult subject involving arbitrary classifications which are not fit categories for legislation.

It is now generally agreed that Man, the genus *Homo*, is represented by a single species to which all living races belong. Species are groups of inbreeding natural populations, reproductively isolated from other such groups. "Reproductive isolation" does not refer to spatial or geo-

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* Some of the bibliographical source material concerning the theoretical aspects of race used in this section were suggested by S. H. Katz, Department of Anthropology, University of Pennsylvania and L. Van Horn, Department of Anthropology, Hunter College, New York.

41. Dobzhansky, *Mankind Evolving*, 253 (1962).

graphical isolation, but rather to *inability* to mate with other species to produce fertile progeny. A species, therefore, is a genetically closed system, since new genes, the biological units of inheritance, cannot be obtained from other groups and passed on through fertile hybrids. Thus, the species is the basic group for biological and anthropological classification.[42]

Between the individual organism—which is the basic unit of the species—and the species itself, is another layer of classification known as race. Racial classification is a classification based on population groups within the species, which because of social or geographical boundaries, have tended to inbreed among themselves over long periods of time. As a result of this endogamy, they tend to express certain similar physical and genetic characteristics.[43]

The process of classification has recently been described in this manner:

> "A race of *Homo sapiens* is a Mendelian population, a reproductive community of individuals sharing a common gene pool. The level at which the reproductive community is defined depends upon the problem one is interested in investigating. There is no absolute, final or 'true' level at which these reproductive communities are defined. All members of our species belong to one Mendelian population, and its name is *Homo sapiens*. This large species-wide Mendelian population may be divided into smaller Mendelian populations, for all practical purposes an infinitely large number of them . . . Races are open genetic systems, and as such they are quite different from species." [44]

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42. See generally: Simpson, *Principles of Animal Taxonomy* 18, 148-152 (1961); Dobzhansky, *op. cit.* (1962).

43. See Johnston, *The Population Approach to Human Variation*, 134 Annals of the New York Academy of Sciences (Feb. 28, 1966), pp. 507-515.

44. Beuttner-Janusch, Book Review, American Journal of Physical Anthropology, 25:2, September, 1966, p. 184.

The practical truth of the statement that races are infinite is shown by Garn and Coon in an article "On the Number of Races of Mankind."[45] Differing classificatory systems have listed as few as two races and as many as two hundred. The difference depends upon whether the classifier is a "lumper," who groups a number of varieties into one broad category because the differences are too trivial to warrant special classification, or a "splitter," who believes that any distinct variety merits attention.[46] The problem usually resolves itself into the classification of a few geographical races, or many local or microgeographical races.

A geographical race may be defined as "a collection of similar populations inhabiting a broad continental area or island chain."[1] A local race is a more neatly circumscribed physically or socially isolated inbreeding population group. If the classifier uses the geographical races, then the number is "approximately six or seven." If the classifier uses local races, the number is "upwards of thirty."[47] In other words, even at the level of greatest generalization, the number is only an approximation.[48] Geographical races, as used in the Virginia statute, are merely "collections of convenience."[49]

Moreover, when an individual leaves his population group and mates with an individual in another group, the racial classification of the offspring is immediately put in question. When miscegenation—which within the last five

45. 57 American Anthropologist 996 (1955).

46. Garn, *Human Races,* 12 (1961).

47. Garn & Coon, *op. cit.* 999.

48. The Virginia statute appears to be based on geographical races when it uses the terms Caucasian, Negro, Mongolian, American Indian, Asiatic Indian and Malay as the basis for its certificates of racial composition in § 20-50. But there is, of course, no agreement on the precise number of geographical races or of the peoples included within them. See classifications noted in Comas, *Manual of Physical Anthropology,* 1960, pp. 18-19; 303-309, and Dobzhansky, *op. cit.* pp. 262-265.

49. Garn and Coon, *op. cit.* 1000.

centuries has risen to rates unprecedented in human history —becomes wide-spread, the arbitrary "classifications of convenience" become even more blurred. And yet these are the standards which have been enacted into law as the basis upon which citizens of Virginia can be imprisoned for up to five years. Such statutes must be immediately suspect.

(B) Statutes Based on Racial Discrimination Serve No Public Purpose and Are Therefore Invalid.

[1] *Racial Purity Can Not Be Preserved Because Racial Purity Does Not Exist.*

The stated purpose of the present Virginia statute is "the preservation of racial integrity."[50] A similar statute was upheld in Missouri as a valid attempt to preserve "the purity of African blood" (although it contained no prohibition against Negro-Japanese or other Negro-non-white marriages).[51]

From an understanding of the concept of race as the classification of generally endogomous population groups separated only by geographical and/or social barriers, it necessarily follows, however, that there is no such thing as a "pure race". Anthropologists are unanimous in their conclusion that pure races do not now exist and never have.

> "The idea of a pure race is not even a legitimate abstraction; it is a subterfuge used to cloak one's ignorance of the phenomenon of racial variation."[52]

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50. The legislative history of the Virginia statutes (see Appellants' Brief) illustrates that the original anti-miscegenation laws were based in part on the premise that the races must be kept separate for political, social and economic reasons associated with slavery. The concept of such separation enforced by law is now so repugnant to our legal system that it need not be discussed.

51. *State v Jackson*, 80 Mo. 175 (1883).

52. Dobzhansky, "The Race Concept in Biology", The Scientific Monthly, LII (Feb., 1941), pp. 161-165; see also citations collected in Weinberger, "A Reappraisal of the Constitutionality of Miscegenation Statutes", 42 Cornell L.Q. 208 (1957).

The geographical and social barriers which separate races are not absolute and there has always been intermixture of the groups. By this logic, as soon as there was a single hybrid offspring, the race was no longer pure. Enough population movement has been known to our species to make it clear that such miscegenation has not been an isolated or rare phenomenon. A statute intended to preserve the non-existent purity of an arbitrarily selected class cannot stand.

[2] *Preservation of Racial Superiority Is Neither a Meaningful Nor Legitimate Statutory Purpose.*

(a) *The Myth of Racial Superiority Developed Along With the Original Misconceptions of Race.*

When Europeans launched the great Age of Exploration, 500 years ago, they began to come into contact with peoples never before seen, or known only through fragmentary reports of brief contacts. The physical differences between the European and the American "Indian", the African Negro and the Asian were obvious and provided the means of classifying races as separate and distinct peoples. More important this phenomenon led to the association of these physical differences with behavioral and cultural differences, and to the assumption that these differences resulted from "inferiority."[53]

> "When the European encounters a barefooted native wearing bizarre clothing, or watches one eating in an apparently unmannerly fashion, or observes some, to him, superstitious or meaningless ritual, he sees these departures from his own standards of behavior not simply as cultural differences, but as indications of

53. See Montagu, *The Idea of Race*, 9-10 (1965); Shapiro, *Race Mixture*, 7-12 (Third Printing, 1965).

> inferiority. It is a subtle thing which the traveler rarely escapes. Even where the conventions and trappings of a foreign culture are impressive in their complexity, this strangeness often lends them an air of unreality, of *opera bouffe*, that in the end renders them somewhat childlike, if not ridiculous."[54]

The feeling of superiority in the beholder is a common reaction—not limited to Europeans. The travel literature of the Chinese, for example, is also filled with similar judgments.[55] But it was the European view of superiority which was enacted into law.

The Europeans' natural feeling of superiority was confirmed as a result of the slave trade which brought to their midst the African Negro, obviously different from the white man and "obviously inferior" to his white captors. It was sustained and further buttressed with the popularization of Darwin's theories of evolution, which were indiscriminately and improperly applied to prove that the "white" race was superior to all others, having reached the pinnacle of evolution.[56]

In his seminal work "On The Origin of the Species" first published in 1859, Darwin had shown how species—not races—had evolved over time by a long process of natural selection which resulted in the "survival of the fittest". His doctrine was solely biological. It had no application to cultures and yet its phraseology lent itself readily to use by the "social Darwinists," who applied the theories of biological evolution to explain cultural difference. Combined with the earlier concept of a "scale of nature," a ladder on which each group had its rank, it provided

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54. Shapiro, *op. cit.* 28.

55. Shapiro, *op. cit.* 28; see also; Hulse, *The Human Species,* 376 (1963), "The names by which the people of a preliterate tribe call themselves, as distinct from everybody else, can very often be translated as *men,* or *real men.*"

56. See generally Eiseley, *Darwin's Century,* especially pp. 297, *et seq.* (1958).

"scientific logic" with which racists could explain the natural and eternal superiority of the white man and justify the separation of the races. Although the theory was widely believed,[57] it had no justification. None of the concepts of racial superiority has survived scientific investigation.

(b) *There Is No Basis for Equating Race and Cultural Potential.*

Cultural activities are man's way of reacting to his environment and there is no evidence of a connection between "race" and cultural or intellectual potential.

> "The evolutionary facts indicate that the mental capacities of human beings in different populations called 'races' are so much alike that for all practical purposes we can assume that given adequate opportunities, the members of any one group could, with the same or similar frequencies, achieve whatever the members of any other group with the adequate opportunities have achieved. Wherever it has been possible to put this

57. A Georgia court upheld anti-miscegenation statutes on the ground that: "[moral and social] equality does not exist and never can. The God of nature made it otherwise, and no human law can produce it and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest archangel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist and must continue to exist through all eternity." *Scott v Georgia,* 39 Ga. 321, 326 (1869).

A Missouri court upheld a statute on the ground that: "It is stated as a well authenticated fact that if the issue of a black man and a white woman and a white man and a black woman intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites . . ." *State v Jackson,* 80 Mo. 175, 179 (1883).

This quotation is significant not because it now appears so ludicrous but because it suggests that only 80 years ago it was thought that Negroes and whites were different species incapable of intermarrying to create fertile progeny!

For convincing evidence that the Virginia statutes were enacted to preserve the superiority of the white race—and the white race only—see Appellants' Brief.

hypothesis to the test, it has been supported by the findings."[58]

The belief "that physical and mental traits are linked, that the physical differences are associated with rather pronounced differences in mental capacities, and that these differences are measurable by IQ tests and the cultural achievements" of populations is what Montagu calls "the myth" of race.[59]

(c) *There Is No Basis for the Belief in Biological Superiority.*

Although racial classifications may reflect some observable physical differences within mankind, "they do so in an artificial and even misleading manner. They tend to give the impression that the human species is naturally partitioned into discrete, discontinuous groups, whereas in studying the geographical distribution of physical characters, we commonly find gradual changes as we pass from one region to another rather than sharp boundaries and abrupt transitions."[60]

The fact of the matter is that "all peoples of the earth are infinitely more alike than they are different."[61] The differences are ones of degree and not of kind.

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58. Montagu, *The Idea of Race*, 62 (1965).

59. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race*, 24 (4th Edition, 1964); See also Garn, *Human Races*, 111 (1961): "There is no evidence for racial differences in character and temperament, other than those due to cultural conditioning."; Stern, *Human Genetics*, 701 (1960): "It is difficult enough to define an over-all social psychology, but even when some valid approximation can be made, it seems to apply only to specific historical periods, or, if the race occupies different parts of the globe, only to specific regions. Differences in group psychology are also well known in different social layers of populations presumably rather genetically homogeneous."

60. Harrison, Weiner, Tanner and Barnicot, *Human Biology*, 191 (1964).

61. Krogman, *Physical Anthropology and Race Relations: A Biosocial Evaluation*, The Scientific Monthly, LXVI, No. 4, April, 1948, p. 317.

No race has a monopoly on any single trait or group of traits. They all include individuals running a scale from short to tall, broad to narrow and light to dark. The differentiation of races by morphological characteristics, therefore, becomes a statistical problem of determining differences in group averages. Having determined the averages, however, nothing necessarily follows about the specific characteristics of individuals within the race.

Herskovits illustrates this fact with the following example.

> "It is a commonplace that the noses of Europeans are narrow, those of Africans broad. Among the broadest-nosed Negroes are the Kajji of the Niger Delta of West Africa; among the Caucasoids with narrowest nostrils are the Swedes. If we set down the average values of this measurement for these two populations, a striking difference between them is to be seen:
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> | | |
> |---|---|
> | 55 Kajji | 45.5 mm. |
> | 260 Swedes | 30.2 mm. |
>
> Yet when we take into account the variability of these two populations in this trait, we see that even such a marked difference in nose form does not prevent *some* Swedes from having broader nostrils than *some Negroes,* and that *some* Negroes have narrower nostrils than *some* Swedes. Kajji noses vary between about 30 to 54 millimeters, while Swedish noses range from about 19 to 37 millimeters. Therefore, if one were to draw a line between 30 and 37 millimeters long, and present it to an expert, asking him to designate whether this line represented the nose-width of a Negro or a Swede, he could not tell from whicl group it had been taken. This would be true in spite of the fact that we are dealing here with populations that represent ex-

treme forms taken by their respective races in the characteristic being measured.[62]

". . . Consequently, we may state as a general principle that *greater differences exist in the range of physical traits that characterize any single race of mankind than between races taken in their entirety.*" [63]

It becomes clear that the use of physical features as the basis for racial definitions of groups or racial identifications of individuals becomes a very slippery problem.[64]

The development in the last century of a scientific study of human genetics has not solved the problems in obtaining the perfect delineation of race. Certain blood types, such as the ABO blood groupings and the rhesus factor, in which heredity patterns can be exactly traced, have been studied exhaustively throughout the entire world. Although the techniques are highly scientific, the studies suffer from the same fundamental weakness as the morphological studies. *If* the classifier can find an isolated and endogamous population group, which itself could be designated as a race, he can make some general conclusions about the average blood type frequencies for the *group*. However, he cannot say from the group averages what type blood an individual will have. And he cannot tell from

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62. The subjects used in this example were not selected at random from their respective geographical white and negro races, but were selected because of a special characteristic peculiar to a limited population group which might be considered a local race. Had the study used random measurements from the geographical races, we could have expected greater range within the races and even greater areas of overlap between them.

63. Herskovits, *Cultural Anthropology*, 61-62 (1964).

64. Even the selection of typologic traits for use in determining race appears to be arbitrary depending on what kind of race the classifier wants to find. Montagu indicates that racial classification became a "parlor game" in which "only those methods of 'race' classification which indicated the 'right sort' of 'race differences' were encouraged and utilized." Montagu, *The Fallacy of Race*, 66; See also Dobzhansky, *Mankind Evolving*, 256.

a person's blood type to what race he necessarily belongs.[65] And also, like the morphological classifications, when significant admixture has occurred, the problem of classification becomes vastly more difficult.[66]

Much of the foundation for the biological supremacy argument has come from studies proving that there are average differences in certain biological characteristics. The error of the lawmakers—like the error of the early observers of race—was to equate difference with biological supremacy, and average differences of a whole population with specific differences in individuals.

Most biological differences between races are believed to represent adaptations to the specific environment in which the race developed. For example the dark skin of the Negroes may provide a shield against the burning sun of the equatorial regions while the lighter skin of northern peoples may permit the less intense light rays to penetrate the skin and help manufacture vitamin D. The long narrow nose of the Caucasoids may allow for warming up cold outside air before it enters the lungs, while the shorter broader nose of the Africans may be more suited to their evenly warmer surroundings.[67]

Even these differences are not as significant today as they may have been in the past, because technological developments "have so greatly changed man's environment and his ability to cope with it . . . that adaptations to former environments are becoming largely obsolete."[68]

But to dwell on this type of question is to confuse the whole issue of biological superiority. The real issue was succinctly put by the distinguished team of human biologists

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65. "When the classifications were based on serological criteria rather than the populations, the results were understandably bizarre." Garn, *Human Races*, 50 (1961). See also, studies in Comas, *op. cit.* pp. 303-307; Hulse, *op. cit.* pp. 295-340.

66. Stern, *op. cit.* 689.

67. Stern, *op. cit.* 695.

68. *Id.*

assembled in 1964 by UNESCO to formulate a statement on the biological aspects of race.

> "Certain physical characters have a universal biological value for the survival of the human species, irrespective of the environment. The differences on which racial classifications are based do not affect these characters, and therefore, it is not possible from the biological point of view to speak in any way whatsoever of a general inferiority or superiority of this or that race."[69]

Thus it becomes entirely clear that the whole superiority notion on which these statutes are based is fallacious.

(d) *Miscegenation Is Not Biologically Harmful.*

By the same token, the judicial justification of the statutes on the basis of detrimental effects upon the offspring of interracial marriages[70] falls completely upon investigation. It has never been proved that interracial marriages have biological disadvantages.[71] This has recently

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69. Statement on The Biological Aspects of Race, UNESCO, 1964. The UNESCO statement so clearly sets forth the fundamental concepts of race and so clearly shows the invalidity of miscegenation laws that it is printed in its entirety as "Appendix B" of the Brief. The statement was signed by many of the world's foremost biologists and anthropologists, including Carlton Coon, whose work has been widely misinterpreted as providing material for racist arguments.

70. "The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observations show us, that the offspring of these unnatural connections are generally sick and effeminate, and that they are inferior in physical development and strength to the full blood of either race . . . Such connections never elevate the inferior race to the position of superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good." *Scott v Georgia*, 39 Ga. 321, 323 (1869).

71. UNESCO Statement, paragraph 9.

been confirmed by one of the most exhaustive studies of interracial matings over conducted, the results of which were released this year. A ten-year investigation of 179,000 births in Hawaii, a state which prides itself on its racial mixture and its lack of racial prejudice, concluded that there are no significant adverse effects detectable from racial mixtures.[72]

In fact, it has been suggested that miscegenation can be positively beneficial to the species by increasing stature, resistance to disease, viability and fertility, a phenomenon known as "hybrid vigor."[73]

(e) *The Preservation of Racial Superiority Is Not a Fit Purpose of Legislation.*

Moreover, the whole concept of a biologically superior race is anathema to our society. We reacted in horror when Hitler proclaimed and enacted laws based on the theory of a "master race" in Germany. He too, had recognized the "higher or lesser value" of the races and had sought to prevent a "niggerized world" in which his concept of "the humanly beautiful and sublime . . . would be lost forever."[74] We found nothing tolerable in Hitler's view of

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72. Morton, Chung, Mi, *Genetics of Interracial Crosses in Hawaii* in the series *Monographs in Human Genetics*, 1967.

73. Stern, *op. cit.* p. 699-701; Harrison, *et al., op. cit.* 163-164. The UNESCO Statement reads: "It has never been proved that interbreeding has biological disadvantages for mankind as a whole. On the contrary, it contributes to the maintenance of biological ties between human groups and thus to the unity of the species in its diversity.

The biological consequences of a marriage depend only on the individual genetic make-up of the couple and not on their race.

Therefore, no biological justification exists for prohibiting intermarriage between persons of different races, or for advising against it on racial grounds."

74. *Mein Kampf*, pp. 383-84. Quoted in Shirer, *The Rise and Fall of the Third Reich*, 88 (1960).

racial superiority. It is far less tolerable in our own society today.

(f) *When the Myths Are Stripped Away, the Anti-Miscegenation Statutes Are Exposed as Being Totally Without Valid Public Purpose.*

Thus, since there is no factual basis to support the concept of biological superiority, the only remaining purpose of the anti-miscegenation statutes is to preserve biological differences; that is, to maintain differences in the color of one's skin, the shape of one's nose and the texture of one's hair. The mere statement of such a purpose shows the absurdity of the entire concept. We do not legislate on such differences within a race; there is no public purpose to be served by regulating nose size. These differences, for legislative purposes, are entirely neutral.[75]

No one would seriously contend that a law which prohibits marriage between light-skinned and dark-skinned people or between blue-eyed and brown-eyed people could be constitutionally sustained. Nor would anyone seriously contend that a law prohibiting marriage between Protestants and Catholics or between Italians and French would be constitutional. Whatever differences may exist between these groups can not provide proper bases for fixing public policy. Nor can the differences between Negroes and whites. Since the anti-miscegenation statutes provide discriminatory treatment merely on the basis of these legislatively neutral differences, they are, by definition, arbitrary and unconstitutional.

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75. The statutes, of course, do not even assure the fulfillment of these purposes. By operating indirectly on a racial basis rather than directly on the actual characteristics, they allow marriage of persons within the same race, even though one party may express certain features which are more likely found in the other race. More important, they prohibit marriages between members of different races, even though they do not possess the traits with which the legislature might have been concerned.

(C) The Anti-Miscegenation Statutes Must Fail Because They Provide Standards of Proof Which Are Impossible of Application and Are Unconstitutionally Vague.

Although the Virginia statute defines a "white" person as one who "has no trace whatever of any blood other than Caucasian," there is, of course, no such thing as "white blood" or "Negro blood" as imagined by the Virginia legislature. But assuming that blood is interpreted to mean ancestry, the state would have to prove beyond a reasonable doubt that Richard Loving had no ancestor *anywhere in his genealogy* who was not "Caucasian". Defendant Richard Perry Loving, in "admitting" he was a "white person" within the meaning of Virginia's penal code (and thereby convicting himself) could not, in fact, have made a knowing admission; nor could the state otherwise have proved he was such a "white person."

Similarly the anti-miscegenation statutes in the other sixteen states are based on the faulty concept of racially different blood, prohibiting marriage between "whites" (or "Caucasians") and "Negroes" or persons of more than a certain proportion of 'Negro blood". But even if they are based on racial ancestry, these terms—which attempt to set forth the essential elements of the crime—are unconstitutionally vague.

> "It is obfuscating, in science, to use the words negroid, mongoloid, caucasoid. Related expressions such as colored, black, yellow, white, do not set any biological contest, either. They have never been defined with any degree of precision or consistency by those who use them." [76]

It should be clear by now that these classifications *cannot* be made or applied with precision.[77]

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76. Beuttner-Janusch, *op. cit.* 184.

77. This Court has had occasion to consider the use of "Caucasian" as a racial definition and to note its vagueness: "It is at best

Furthermore, the courtroom proof of race necessarily depends upon appearance. Proof that one's father came from Africa is not sufficient to make him a Negro—particularly if his father had been the Prime Minister of Rhodesia. A defendant would be considered a "Negro" only if he *looked* like a "Negro" to a judge or jury (laymen) and that determination could be made only upon the morphological basis which scientists have rejected as an unreliable indicator of race. Thus the appearance test destroys any pretense of objectivity.

> "Owing to the variation within all races and the overlapping between contiguous races, it is unsafe to classify persons by their appearance and it should never be done for research purposes."[78]

If the test is too dangerous for the purpose of scientific study which carries with it no direct consequences to the individual involved, certainly it is too dangerous in the hands of a layman for the purposes of depriving a man of his liberty for ten years. It is well-established that—

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a conventional term, with an altogether fortuitous origin, which, under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example (The World's Peoples, 24, 28, 307, *et seq.*) it includes not only the Hindu but some of the Polynesians (that is, the Maori, Tahitians, Samoans, Hawaiians, and others), the Hamites of Africa, upon the ground of the Caucasic cast of their features, though in color they range from brown to black. We venture to think that the average well-informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements." *US v Bhagat Singh Thind*, 261 US 211.

The statutory classifications, which deal with arbitrarily selected and constitutionally vague concepts to begin with, become even more arbitrary by the use of different tests for determining race. In Virginia, a person is "white" only if he is "pure" white, but he is "Negro" if there is any taint of "Negro blood." A more inconsistent and arbitrary classification could hardly be imagined.

78. Laughlin, "Races of Mankind: Continental and Local", Anthropological Papers of the University of Alaska, Vol. 8, No. 2, May, 1960; Reprinted in Lasker (ed.), *Physical Anthropology, 1953-1961*, Yearbook of Physical Anthropology, Vol. 9, pp. 149, 153.

> "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide without any legally fixed standards what is prohibited and what is not in each particular case." *Giaccio v Pa.*, 382 US 399, 402-403.

The anti-miscegenation statutes clearly run afoul of this test. On this basis alone, they cannot stand.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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